

No. 48623-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**BRENDA ANN WING,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Corrected  
Respondent's Brief**

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## **I. ISSUES**

- A. Did the trial court fail to conduct the required evidentiary hearing prior to finding Wing breached the Proffer Agreement?
- B. Did the State breach the Proffer Agreement with Wing when it filed an amended information adding aggravating factors?
- C. Did the trial court error when it found the State had proved Wing breached the Proffer Agreement?
- D. Did the trial court conduct an adequate inquiry of Wing's ability to pay prior to imposing discretionary legal financial obligations?
- E. The issue regarding the imposition of appellate costs if the State is the prevailing party has been mooted by the amendment of RAP 14.2.

## **II. STATEMENT OF THE CASE**

On November 7, 2014, the State charged Brenda Ann Wing with Count I – Homicide By Abuse, or in the alternative, Count II – Manslaughter in the First Degree. CP 1-4. Included in the Information were two aggravating factors, (1) the defendant used his or her position of trust, or confidence, to facilitate the commission of the crime, and (2) the defendant should have known the victim was particularly vulnerable or incapable of resistance. *Id.* The information also included accomplice liability language. *Id.* The State submitted a probable cause affidavit based upon the police reports regarding

the investigation into Wing's and her husband, Danny's,<sup>1</sup> actions that caused the death of JJH.<sup>2</sup> CP 5-8.

On October 5, 2014, Lewis County emergency dispatch received a phone call regarding an unresponsive three-year-old child. CP 5. The child, later identified as JJH, was pronounced dead at Centralia Providence Hospital. *Id.*

During the investigation it was discovered that JJH's mother had become homeless and unable to care for JJH, so she asked the Wings, whom she met previously, to care for JJH. CP 7. JJH's mother had a note signed by herself, Wing, and Danny, which made Wing and Danny the guardians of JJH from "7/31/14 to 7/31/15..." *Id.*

The Wing household, according to the Wings, consisted of Wing, Danny, Zackery Kidder (18), and the Wings' children. CP 5. Wing told detectives that she and Danny had picked up JJH the night before from his mother in Woodland. *Id.* Wing explained she and Danny often watched JJH because his mother was a drug user. CP 6. Wing also told detectives she believed the child had been abused

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<sup>1</sup> The State will refer to Danny Wing by his first name to avoid any confusion, no disrespect intended.

<sup>2</sup> JJH is referred to as JJH-W in later charging documents. The State will refer to him as JJH in this briefing.

while in the mother's care. *Id.* Wing detailed a number of injuries she had seen on JJH. *Id.*

Wing told detectives on the morning of October 5, 2014, JJH woke her up by moaning that JJH was hungry. *Id.* JJH barely ate a little toast and some Gatorade. *Id.* According to Wing, JJH was not saying much, but did open his eyes. *Id.* Around 4:00 p.m. Wing decided she should get JJH up. *Id.* When Wing attempted to wake up JJH she lifted up his arm and it fell limply to the floor, JJH was not moving, but Wing believed he was still breathing. *Id.*

Wing told detectives she gave the child a cold bath in an attempt to revive him, and when she did, noticed bruising that had not been visible previously all over his body. *Id.* JJH stopped breathing, Wing had Danny call 911, and they began CPR. *Id.*

Danny also gave a statement to the detectives, but he told the detectives he and Wing picked up JJH on Friday night, October 3, 2014, not Saturday, October 4. *Id.* Danny also told the detectives he had noticed the bruising on Saturday, not right before 911 had been called. *Id.*

Mr. Kidder told detectives JJH had been picked up two days before his death. CP 7. Mr. Kidder later admitted he had been instructed to tell law enforcement this by Danny, and that for the



seven to 10 days Mr. Kidder had stayed with the Wings, JJH had been at the residence the entire time. *Id.* Mr. Kidder also described to detectives how JJH would simply fall over at times, stiffen, and writhe in pain. *Id.* These incidents would occur for up to 30 minutes and multiple times each day. *Id.*

The preliminary autopsy findings indicated that JJH had several abuse-related injuries. CP 8. These injuries were dated as weeks if not months old and were within the time JJH had been with the Wings. *Id.* The preliminary cause of death was Chronic Battered Child Syndrome. *Id.* The secondary cause of death was skin infections. *Id.*

Wing entered into a Proffer Agreement with the State. CP 46-48. In part 1 of the agreement, it spelled out the essence of the agreement:

(a) Brenda A. Wing agrees to truthfully describe all that she remembers and truthfully answer all of the State's questions to the best of her ability.

(b) The State agrees to dismiss with prejudice the Homicide by abuse charge against Brenda A. Wing, so long as Brenda A. Wing fulfills part (1)(e).

(c) If Brenda A. Wing tells the truth during interview(s) and if necessary, testifies truthfully with these statements at trial, the State shall offer Manslaughter 1<sup>st</sup> Degree-DV and other charged which would result in her having an offender score of 6 (six). All of the charges would be without enhancements or

aggravators but all charges would be without enhancements or aggravators<sup>3</sup> but all charges would not merge or be considered same criminal conduct by the parties. Each party would then be free to argue within the standard sentence range. (i.e. 146-194 months based upon the current offender score of 6).

(d) If Brenda A. Wing is not truthful during the interview(s) or trial(s), then the State shall offer Manslaughter 1<sup>st</sup> Degree Domestic Violence & Assault in the 3<sup>rd</sup> Degree Domestic Violence, both charges with enhancements. Each party would then be free to argue between low end of the standard range and maximum penalty (i.e. Life imprisonment).

(e) Brenda Wing agrees to plead guilty pursuant to the terms of this agreement as summarized here and elaborated upon below.

CP 46. Wing pleaded guilty on May 7, 2015 to Count I: Manslaughter in the First Degree – DV; Count II: Assault in the Third Degree – DV, Count III and IV: Possession of a Controlled Substance, Count V and VI: Witness Tampering. 1RP<sup>4</sup> 2-11; CP 19-28. As part of the plea, Wing admitted she, as an accomplice, recklessly caused the death of JJH, who JJH was a member of her household. RP 7; CP 27.

The State filed a motion on September 18, 2015 to find Wing in violation of the Proffer Agreement. CP 29-30. The State filed a

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<sup>3</sup> There was a footnote in the Proffer Agreement, footnote 1, which stated that in the agreement enhancement and aggravator are used interchangeably. CP 46.

<sup>4</sup> There are two volumes of the verbatim report of proceedings. The State will cite the May 7, 2015 change of plea hearing as 1RP. The State will cite the November 20, 2015 and January 22, 2016 volume as 2RP.

memorandum that outlined the violations. CP 31-120. Wing's attorney responded, alleging the State breached the agreement. CP 121-66. There was a hearing on November 20, 2015 where the trial court found the State did not breach the agreement and gave Wing the option of proceeding to sentencing or taking a second polygraph. 2RP 13-14. Wing opted for opportunity to take a second polygraph. 2RP 14-15.

On January 22, 2016 the trial court, after a hearing on the matter, and listening to argument from both sides, found Wing materially breached the agreement. 2RP 17-42. The trial court entered an order finding a violation of the Proffer Agreement. CP 167-69. The order also states trial court accepts the stipulation to the filing of the supplemental amended information adding aggravating factors. CP 169. The State handed up the amended information adding back in the aggravating factors as they were originally filed pursuant to the Proffer Agreement. 2RP 42; CP 170-74.

The State requested an exceptional sentence of 55 years. 2RP 44. Wing's attorney asked the trial court for a 146 month (12 years and 2 month) sentence. 2RP 47. The trial court sentenced Wing to an exceptional sentence of 416 months (34.5 years) in

prison. 2RP 57; CP 180. Findings of fact and conclusion of law were entered. CP 200-01. Wing timely appeals her sentence. CP 202.

The State will provide supplemental facts below in its argument below.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT CONDUCTED THE REQUIRED EVIDENTIARY HEARING IN REGARDS TO THE BREACH OF THE PLEA AGREEMENT, FURTHER, WING CANNOT CHALLENGE THE ALLEGED LACK OF AN EVIDENTIARY HEARING FOR THE FIRST TIME ON APPEAL WITHOUT THE REQUISITE SHOWING OF A MANIFEST CONSTITUTIONAL ERROR.**

The trial court conducted an evidentiary hearing in regards to whether Wing and/or the State breached the plea agreement as both sides alleged a breach, contrary to Wing's assertion to this Court. See Brief of Appellant 17-21. The State and Wing's trial counsel filed memorandums with the trial court that included exhibits for consideration. CP 31-166. Wing's trial counsel proceeded with the hearings with no objection to the procedure in regards to how the evidentiary process was conducted. See 2RP. Therefore, the trial court complied with the requirement of holding an evidentiary hearing before declaring a breach of the plea agreement. Further, Wing has not preserved the issue below, nor does she address in the briefing how the issue is a manifest constitutional error that can be brought

before this Court for the first time on appeal. Therefore, this Court should find the trial court held the required evidentiary hearing.

### **1. Standard Of Review.**

Constitutional issues and questions of law are reviewed de novo. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). A claim of a manifest constitutional error is also reviewed de novo. *State v. Blancaflor*, 183 Wn. App. 215, 222, 334 P.3d 46 (2014).

### **2. The Trial Court Held The Requisite Evidentiary Hearing Prior To Determining Wing Breached The Proffer Agreement.**

A plea bargain involves a defendant voluntarily waiving a number of constitutional rights, therefore negotiation of a plea bargain between a defendant and the prosecution is an issue of constitutional magnitude. *In re James*, 96 Wn.2d 847, 849, 640 P.2d 18 (1982). A plea agreement is more than a simple contract. *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997). A plea agreement concerns the fundamental rights of the accused, and therefore, “constitutional due process considerations come into play.” *Sledge*, 133 Wn.2d at 839. Due process requires prosecutors to adhere to the terms of a plea agreement. *Id.* (internal citation omitted).

The State may not unilaterally nullify a plea agreement. *James*, 96 Wn.2d at 850. The determination of whether a plea agreement has been breached is the province of the court. *Id.* The State is required to show, at an evidentiary hearing, “by a preponderance of the evidence, that the defendant failed to perform his or her part of the agreement.” *Id.* (internal citations omitted). The hearing ensures the defendant’s due process rights are protected, giving the defendant the ability to produce evidence or call witnesses. *Id.*

A defendant is not required to demand an evidentiary hearing. *Id.* at 851. If a hearing is not conducted, the State has the burden of showing the defendant waived his or her right to the hearing. *Id.* This Court will not presume there has been a waiver. *Id.* “The State carries a heavy burden of demonstrating a voluntary, knowing, and intelligent waiver of any constitutional right.” *Id.* (internal citations omitted).

The State submitted a motion and memorandum on September 18, 2015 alleging Wing had breached her Proffer Agreement. CP 29-120. The State attached four appendixes to the memorandum, which were exhibits that it relied upon to show the breach. CP 36-120. Appendix A was the Statement of Defendant on

Plea of Guilty which included the Proffer Agreement as an attachment. CP 36-48. Appendix B was the statement Wing gave Detective McGinty on June 2, 2015 after she pleaded guilty. CP 49-106. Appendix C was the transcript of the jail phone call between Wing and Shelly Ward which occurred on September 15, 2015. CP 107-15. Appendix D was a copy of the State's Supplemental to Second Amended Information Adding Aggravating Factors. CP 116-20.

Wing's trial counsel submitted a Motion to Compel Specific Performance of Plea Agreement, or Petition for Leave to Withdraw Plea of Guilty and Enter a Plea of Not Guilty on November 18, 2015. CP 121-61. Attached to the motion were three appendixes containing exhibits that Wing relied upon for her motion. CP 130-61. Appendix A was the Proffer Agreement that Wing and the State entered into on May 7, 2015. CP 130-32. Appendix B were the results, including the graphs and numerical analysis, from Wing's September 15, 2015 polygraph examination. CP 134-56. Appendix C was the polygraph report written by Carol Miller, a licensed polygraph examiner, on November 1, 2015 regarding Wing's October 28, 2015 polygraph examination. CP 158-61.

The State filed an additional memorandum in support of the trial court finding Wing breached the Proffer Agreement. CP 162-166. The State included Appendix A, which was another copy of the report written by Carol Miller. CP 166. The State had also previously filed, after it filed its September 18, 2015 motion, a copy of Sergeant DeHart's report regarding Wing's September 15, 2015 polygraph examination. CP 220-23.

On November 20, 2015 the parties appeared for the previously scheduled sentencing hearing. 2RP 3. Wing's attorney stated at the beginning of the hearing:

Your Honor, good afternoon. My Name is John Crowley appearing on behalf of Brenda Wing.

And Your Honor, I understand we're on for sentencing. I know there's a motion by the prosecution that I assume will be heard first. We've responded, and I'm sure the court will have some questions.

2RP 3. The State acknowledged it had filed the motion and that the trial judge had read it. *Id.* The State outlined, based upon the documents it filed, why it believed there had been a breach of the Proffer Agreement. 2RP 3-6. Wing's trial counsel responded, explaining why Wing had not violated the Proffer Agreement. 2RP 6-8, 10-11. The State responded, explained how the discovered lie of Wing over the jail phone call was a material breach of the agreement.



2RP 11-12. Wing's attorney responded as to why it was not a breach. 2RP 12. The trial court ruled there was no breach by the State and asked Wing's trial counsel how he wished to proceed? 2RP 13. The trial court gave Wing the option of proceeding to sentencing or stating she wanted a second polygraph in accordance to the Proffer Agreement. 2RP 13-14.

The trial court made it clear to Wing's attorney that it was finding at that time that Wing breached her agreement but would give her an opportunity to exercise her right to another polygraph examination. 2RP 14. There was a conference between Wing and her trial counsel. 2RP 14. Wing's trial counsel informed the court Wing believed it was in her best interest to obtain another polygraph examination. 2RP 14.

On January 22, 2016, there was a sentencing hearing set again, as well consideration of whether Wing breached the Proffer Agreement. 2RP 17. The State had attempted to provide the trial court with an actual copy of the jail recording, which ultimately was submitted to the trial court without objection. 2RP 17-18. The State again outlined how Wing had violated the Proffer Agreement. 2RP 18-24. Wing's trial counsel again argued as to why there was not a breach. 2RP 24-25. The State responded with its argument. 2RP 25-

27. The trial court found again that the State had not breached its agreement with Wing. 2RP 39-40. The trial court found Wing breached the Proffer Agreement by not being truthful in several ways. 2RP 40-41.

Contrary to Wing's assertion to this Court, the trial court conducted an evidentiary hearing. See 2RP. Wing states she did not knowingly, voluntarily, and intelligently waive her right to a hearing and points that she argued that she was in compliance with the agreement. Brief of Appellant 19. The two are separate issues, as a person can waive their hearing and still argue they are in compliance. Yet, an inquiry to whether Wing waived her right to a hearing is not required as an evidentiary hearing was conducted.

The cases cited by Wing are distinguishable. In *State v. Morley*, the Court of Appeals found State failed to prove Morley had breached the agreement. *State v. Morley*, 35 Wn. App. 45, 47-48, 665 P.2d 419 (1983). The Court noted, "Defendant admitted to becoming intoxicated and being arrested. No inquiry was made or proof offered as to the underlying facts or disposition of the charges." *Morley*, 35 Wn. App. at 47. The trial court in *Morley* found that Morley had committed two more crimes. *Id.* Morley's above admissions were not sufficient and the Court set aside the sentence. *Id.* at 48.

In *United v. Simmons*, the defendants had been indicted with a three counts of bank robbery, pleaded guilty on all counts, and the agreement with the government was it would dismiss two counts at sentencing in exchange for certain conditions to be met by the defendants. *United v. Simmons*, 537 F.2d 1260, 1261-62 (1976). The government stated there was a breach after the FBI interviewed the defendants and the prosecutors determined the defendants had not made full disclosures. *Simmons*, 537 F.2d at 1262. The government informed the defendants that it was changing the terms and conditions of the plea agreement, and it then made a recommendation greater than the original agreement to the court at sentencing. *Id.* The Fourth Circuit held the government could not unilaterally act upon the plea agreement. *Id.* It was for the court to find there was a substantial breach of the agreement. *Id.* 1262-63.

Similar to *Simmons* and *Morley*, in *State v. Roberson*, there was no hearing in regards to whether there was a breach of the plea agreement. *State v. Roberson*, 118 Wn. App. 151, 158-59, 74 P.3d 1208 (2003). The court remanded the case back to the trial court to hold the required evidentiary hearing. *Roberson*, 118 Wn. App. at 159.

All of the above cases are distinguishable because the State in all of those cases did not bother to produce any evidence of a breach of the agreement. The State submitted evidence, the appendixes, for the trial court's consideration. There is no requirement for live testimony in an evidentiary hearing. Further, if the parties both had an opportunity to object to any of the documents considered by the court, and did not. See 2RP. Admissions by a party opponent, which was what was contained in the majority of the State's appendixes (the statement to Detective McGinty, Wing's jail phone call, her statements to the polygraphist), were all admissible as they are not hearsay. ER 801(d)(2). The fact that Wing elected to submit her exhibits to the court through the motion filed by her attorney and chose not to call witnesses to testify, does not negate the fact that there was an evidentiary hearing.

This Court should find the trial court held an evidentiary hearing. The trial court actually held two evidentiary hearings, allowing Wing a second bite at the apple to produce additional evidence showing she actually complied with the Proffer Agreement. Wing's contrary claim is without merit and this Court should affirm the plea and sentence.

### **3. Wing Has Not Demonstrated The Alleged Error Is A Manifest Constitutional Error That May Be Raised For the First Time On Appeal.**

An appellate court generally will not consider an issue a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, *citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual

prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice, the error is not manifest. *Id.*

Wing fails to address to this Court how she is able to raise the issue regarding the alleged failure to hold an evidentiary hearing to determine if she breached the plea agreement. Brief of Appellant 17-21. Wing did not preserve the alleged failure to hold a hearing below. See 2RP. Nowhere found in Wing's brief does it mention RAP 2.5(a) or manifest constitutional error. *Id.*

There is no dispute the issue regarding the alleged failure to hold an evidentiary hearing implicates Wing's due process rights and would therefore be an issue of constitutional magnitude. The case law does state a defendant does not need to demand the hearing in order to be entitled to one. *James*, 96 Wn.2d at 851. This does not remove the requirement for an appellant to show a non-preserved error is a manifest constitutional error in order to raise it for the first time on appeal.

The State maintains an evidentiary hearing, two evidentiary hearings, were held on the matter. If this Court finds the hearings were not sufficient because the State did not present live testimony, to which Wing could cross-examine and present her own witnesses to rebut (which the State, again, maintains Wing was always able to do, but chose not to), the error is not manifest because Wing waived a full evidentiary hearing.

A waiver of a constitutional right must be voluntary, knowing, and intelligent. *James*, 96 Wn.2d at 851. This Court does not presume a defendant makes such a waiver. *Id.* It is the State's burden to demonstrate to this Court the defendant has in fact waived her constitutional right. *Id.* This is a fact specific inquiry, as demonstrated by the opinion in *In re James*. *Id.* In *James* the Supreme Court states:

Here petitioner has a right to such a hearing notwithstanding his failure to make a motion either to withdraw the plea or to enforce the agreement. The facts of this case dictate such failure does not constitute a knowing waiver of his constitutional rights. Petitioner is unable to read and write and has spent over a year in a school for retarded children. Nothing in the record indicates he was aware of the consequences of failing to make such a motion. Furthermore, petitioner alleges that he requested his attorney to withdraw the plea, and he contends he is not guilty of the alleged misdemeanors. In its response to this petition, the State does not deny these facts; nor does the State allege that the petitioner waived a right

to have this question reviewed on collateral review. Not only does the State fail to claim that the question has been waived, the record provides no basis for finding petitioner voluntarily waived his right to an evidentiary hearing.

*Id.* (footnote omitted).

In the present case, unlike *James*, it was known that Wing completed the 12<sup>th</sup> grade and could read and write. 1RP 3-4; CP 161. Wing's attorney filed a Motion to Compel Specific Performance of Plea Agreement, or Petition for Leave to Withdraw Plea of Guilty and Enter a Plea of Not Guilty. CP 121-61. This was filed after the State filed its motion to find Wing had breached the Proffer Agreement. CP 129-30, 121-61. Wing proceeded with the two hearings that were conducted, she was represented by her attorney, and during the first hearing when given a choice as to how to proceed it was clear upon the record, Wing and her attorney consulted before the choice was made for the continuation of the matter for Wing to obtain another polygraph examination. See 2RP.<sup>5</sup>

With this record of Wing's intellectual abilities, her involvement in the hearings and decision on how to proceed, and that her attorney filed a motion to force specific performance due to the State's alleged breach of the agreement, Wing's actions show

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<sup>5</sup> 2RP 14 is where the Court can find the attorney/client conference.



she knowingly and willingly participated in the hearings as they were conducted and waived the right to call witnesses to testify. Further, the trial court considered evidence presented by both the prosecution and Wing before making its determination. There is no showing by Wing she was actually prejudiced. This Court should decline to entertain the issue for the first time on appeal.

If this Court determines there was an error that may be raised and no evidentiary hearing was conducted, the proper remedy is to remand the case for the trial court to conduct the proper evidentiary hearing. *James*, 96 Wn.2d at 850-51.

**B. THE TRIAL COURT DID NOT MISCONSTRUE A SECTION OF THE PROFFER AGREEMENT, THEREBY INCORRECTLY INTERPRETING THE PROFFER AGREEMENT.**

Wing argues the trial court misconstrues the plain language of section 7(a) of the Proffer Agreement, which led to the finding that Wing breached the agreement. Brief of Appellant 22-26. Wing fails to look at the Proffer Agreement as a whole, instead, she centers all of her attention on one paragraph of the agreement. This is a faulty application of contract principles. The trial court correctly interpreted the Proffer Agreement, finding a breach by Wing. This Court should affirm the trial court's interpretation of the Proffer Agreement.

### **1. Standard Of Review.**

The interpretation of a plea agreement is a question of law because it is a contract, and therefore reviewed de novo. *State v. Bisson*, 156 Wn.2d 507, 517, 130 P.3d 820 (2006).

### **2. Plea Agreements Are Governed By Contract Principles.**

Plea agreements are analyzed using basic contract principles. *Sledge*, 133 Wn.2d at 838. This is because “[a] plea bargain is analogous to a contract right and its terms are read as a contract.” *State v. Armstrong*, 109 Wn. App. 458, 461, 35 P.3d 397 (2001) (internal quotations and citations omitted). The law imposes an implied promise upon the State to act in good faith. *State v. Harrison*, 148 Wn.2d 550, 556, 61 P.3d 1104 (2003).

Interpretation of a contract is the process in which one ascertains the meaning of the expressions, symbols, or words of the parties used in the document. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). “The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties.” *Berg*, 115 Wn.2d at 663 (internal quotations and citations omitted).

In *Berg*, the Supreme Court decided it would adopt the “context rule” over the “plain meaning” rule of contract interpretation.

*Id.* at 666-68. The “context rule” can be explained as follows:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.

*Id.* at 667, *citing Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.3d 221 (1973). The Supreme Court held, in order to ascertain the intent of parties, extrinsic evidence regarding the entire circumstances under which the contract was made would be admissible. *Id.* at 667.

### **3. The Trial Court Did Not Misconstrue The Language Of The Proffer Agreement.**

Wing’s central argument is the plain language of section 7(a) of the Proffer Agreement was misconstrued by the trial court because the trial court did not read the section applying the plain language of the provision. Brief of Appellant 23-24. Wing is correct, section 7(a) of the Proffer Agreement does state:

Ensuring Truthfulness: To ensure Brenda A. Wing testifies consistently with her truthful and complete statement as outlined in number 2 above, the State shall be entitled to re-file the Manslaughter in the 1<sup>st</sup> degree enhancements if the State can demonstrate by

a preponderance of evidence to the trier-of-fact that Brenda A. Wing either:

- (a) provided a false statement regarding a material fact as demonstrated by irrefutable evidence agreed to by the defense, or in the absence of agreement, by the defendant's failure of two polygraphs<sup>6</sup> administered by licensed polygraphists, one of whom is selected by the defense;

CP 47. Wing's argument is that she did not fail two polygraphs by a licensed polygraphist, nor did she agree she provided a false statement regarding a material fact as demonstrated by irrefutable evidence, therefore, there could be no breach of the agreement. Brief of Appellant 23-26. This is the same argument Wing's trial counsel made to the trial court. 2RP 24-25, 37.

What Wing fails to acknowledge is that section 7(a) cannot be read in a vacuum. The Proffer Agreement must be read in totality, which includes the first section of the agreement that Wing glosses over. See Brief of Appellant 24. Section 1 of the Proffer Agreement states:

Parties, Purpose & Essence: This agreement is between the Lewis County Prosecutor Attorney's Office (LCPA) and Brenda A. Wing. The purpose of Brenda A. Wing making this proffer is to provide LCPA with an opportunity to assess the value, extent, and truthfulness of her information about the criminal

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<sup>6</sup> Inconclusive results do not determine truth or deception; therefore a re-test may be administered.

activity of herself and others as it relates to what happened to [JJH]. The essence of this plea agreement is as follows and all subsequent paragraphs shall be understood to facilitate this essence:

(a) Brenda A. Wing agrees to truthfully describe all that she remembers and truthfully answer all of the State's questions to the best of her ability.

(b) The State agrees to dismiss with prejudice the Homicide by Abuse charge against Brenda A. Wing, so long as Brenda A. Wing fulfills part (1)(e) of this agreement.

(c) If Brenda A. Wing tells the truth during interview(s) and if necessary, testifies truthfully with these statements at trial, the State shall offer Manslaughter 1<sup>st</sup> Degree-DV and other charges which would result in her having an offender score of 6 (six). All of the charges would be without enhancements or aggravators<sup>7</sup> but all charges would not merge or be considered same criminal conduct by the parties. Each party would then be free to argue within the standard sentence range. (i.e. 146-194 months based upon her current offender score of 6).

(d) If Brenda A. Wing is not truthful during the interview(s) or trial(s), then the State add enhancements to the Manslaughter 1<sup>st</sup> Degree Domestic Violence & Assault in the 3<sup>rd</sup> Degree Domestic Violence charges. Each party would then be free to argue between the low end of the standard range and the maximum penalty (i.e. Life imprisonment).

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<sup>7</sup> For purposes of this agreement the words enhancement(s) and aggravator(s) are used interchangeably as it will be up to the State, and only the State, to determine which enhancement(s) or aggravator(s) shall be added to the information if it is discovered Brenda A. Wing has violated the terms of this agreement.

(e) Brenda A. Wing agrees to plead guilty pursuant to the terms of this agreement as summarized here and elaborated upon below.

CP 46. This section of the Proffer Agreement sets forth the purpose and intent of the entire agreement. *Id.* The essence being, if Wing is truthful during her interview(s) she gets the benefit of the bargain and a set standard sentencing range for which the parties may argue. *Id.* If Wing is not truthful during the interview(s), then the State is able to add enhancements (aggravators) to the Manslaughter in the First Degree – Domestic Violence count and the Assault in the Third Degree – Domestic Violence count. *Id.* If the State adds the enhancements (aggravating factors), each party is free to argue between the low end of the standard range and the maximum penalty, which in the Manslaughter in the First Degree count would be life imprisonment. *Id.*

The purpose of the agreement was to assess the information Wing was going to give the Lewis County Prosecutor's Office (LCPA) regarding what happened to JJH *Id.* The Proffer Agreement's purpose was "to provide LCPA with an opportunity to assess the value, extent, and truthfulness" of Wing's information she provided in accordance to the agreement regarding her criminal activity and that of others as it related to what happened to JJH *Id.* Further, section 1

states, “all subsequent paragraphs should be understood to facilitate this essence” then lists (a) through (e) above. *Id.*

Wing signed the Proffer Agreement, on the same day she entered her Statement of Defendant on Plea of Guilty. CP 36-48. If you take her counsel’s statement to heart, she took her time reading the Proffer Agreement, which in turn means she would have read the purpose and essence portion set forth in section 1. See RP 28.

Wing cites to her trial counsel’s statement regarding their interpretation of the Proffer Agreement, arguing because Wing’s trial counsel argued to the trial court that they had focused on the language of section 7(a), that was her interpretation of the entire agreement at the time of her plea. Brief of Appellant 25-26. Citing to *State v. Thomas*, Wing argues this interpretation rules because there is no evidence in the record before this Court to counter it. Brief of Appellant 26, *citing State v. Thomas*, 79 Wn. App. 32, 41, 899 P.2d 1312 (1995). But Wing’s own counsel statement, “She indeed *may* be protected. I mean, I can just tell the court that Ms. Wing did not sign this Proffer Agreement by reviewing it in a 20 to 30-second period. The language was focused on.” 2RP 28 (emphasis added). Wing’s trial counsel did not state unequivocally that Wing understood, at the time of her plea, the Proffer Agreement gave her

protection if Wing did not agree she provided a false statement of a material fact demonstrated by irrefutable evidence, the State could not prove a breach of the agreement in the absence of two failed polygraphs given by a licensed polygraphist. *Id.* Trial counsel did argue for that interpretation of the contract. 2RP 24, 29. But arguing for that interpretation and stating that is what Wing understood at the time of entering her plea are two different things.

Reading the Proffer Agreement as Wing suggests, if one was to require the language of section 7(a) to require either the defense to agree there was irrefutable evidence of a false statement regarding a material fact, or two failed polygraphs given by a licensed polygraphist, then all Wing would have to do is refuse to take a polygraph, and she would never be in breach of the agreement because the State cannot force her to agree. CP 46-48. This would nullify section 1, as the purpose of the agreement was to allow the State, in part, the opportunity to assess the truthfulness of Wing's statements in interview(s). CP 46. Further, it is clearly stated in 1(d) that if Wing was not truthful during the interview(s) the State would add the enhancements (aggravating factors) to the Manslaughter and Assault in the Third Degree counts. *Id.*



The trial court found it was not reasonable to construe the agreement to mean Wing could simply come in and state, “We don’t agree” as that would be inconsistent with the other parts of the agreement. 2RP 40. The trial court did note the phrase in section 7(a) was inartfully drafted, and if read in isolation it is easy to pick apart, but the agreement had to be read as whole. *Id.* This is the correct application of contract interpretation, as context rules over plain meaning. *Berg*, 115 Wn.2d at 666-68.

The intention of the parties was clear from section 1 of the agreement, as well as section 7, when read in its entirety. CP 46-48. There would never be a need for the State to be required to “demonstrate by a preponderance of evidence to the tier-of-fact” Wing provided a false statement about a material fact if that fact had to be agreed to by the defendant. CP 47. The trial court found the State must prove by a preponderance of the evidence Wing had made a false statement about a material fact as demonstrated by irrefutable evidence. 2RP 40. The trial court’s interpretation of the Proffer Agreement does not misconstrue the agreement of the parties, is not contrary to the language in the statement, and considers the language of section 7(a) in the context of the entire

agreement. This Court should affirm the trial court's interpretation of the Proffer Agreement.

**C. THE STATE MET ITS BURDENT TO PROVE A MATERIAL BREACH, THEREFORE THE TRIAL COURT CORRECTLY FOUND THAT WING BREACHED THE PROFFER AGREEMENT.**

Wing argues the State did not prove a material breach, therefore the trial court's finding Wing had materially breached the Proffer Agreement was incorrect, and this Court should reverse. Brief of Appellant 26-34. Wing's argument rests on whether the State produced irrefutable evidence of a false statement of a material fact. *Id.* Wing asserts to this Court none of Wing's statements the State alleged were untruthful in its motion to find a violation of the Proffer Agreement were material. *Id.* The State presented irrefutable evidence Wing provided a false statement regarding a material fact, which was a breach of Proffer Agreement, and this Court should affirm.

**1. Standard Of Review.**

Appellate courts review allegations of a breach of a plea agreement de novo. *State v. Neisler*, 191 Wn. App. 259, 265, 361 P.3d 278 (2015), *citing State v. MacDonald*, 183 Wn.2d 1, 8, 346, P.3d 748 (2015). In determining whether the State has breached its

plea agreement, the reviewing court applies an objective standard.

*Sledge*, 133 Wn.2d at 843 n.7.

**2. The State Proved Wing Breached The Proffer Agreement By Failing To Comply By Providing A False Statement Regarding a Material Fact, Demonstrated By Irrefutable Evidence.**

To prove Wing breached the Proffer Agreement the State was required to demonstrate to the trier-in-fact, by a preponderance of the evidence, Wing “provided a false statement regarding a material fact as demonstrated by irrefutable evidence.” CP 47. “A material breach is one that substantially defeats a primary function of the contract.” *Top Line Builders, Inc. v. Bovenkamp*, 179 Wn. App. 794, 808, 320 P.3d 130 (2014) (internal quotations omitted). The materiality of the “breach is a question of fact.” *Id.*

Section 2 of the Proffer Agreement set forth the requirements of the statements and information Wing must provide in order to get the benefit of her bargain. CP 46-47. Section 2 states:

Information: Brenda A. Wing will provide truthful and complete information, with no material misstatements or omissions of fact, relating directly or indirectly to any criminal activity related to the abuse or death of [JJH]. Brenda A. Wing will neither attempt to protect any person who has been involved in criminal activity, nor falsely implicate any person in criminal activity. Such statement shall be a videotaped statement (under penalty of perjury to law enforcement at an agreed upon time and location). This video shall become part of discovery and a copy shall be provided to Danny

Wing and Brenda A. Wing's respective counsel, as well as the counsel of any other person who may be charged with a crime related to the abuse or death of [JJH]. Any statement provided by Brenda A. Wing may be corroborated by the State as true and/or she may pass a series of polygraph examinations (the number of exams and scope of questions to be determined by the State after consultation between the state examiner and the defense polygraphist with deference given to the examiners in this area of their expertise). Upon completion of the examination(s) defense examiner shall timely have an opportunity to review polygraph data. Should the State believe that Brenda's statement(s) contain material misstatements or omissions of material fact, then the parties' shall proceed with the plea outlined in number 4, but the defendant is subject to the procedure outlined in number 7.

CP 46-47. The State alleged Wing violated the Proffer Agreement in four ways:

- 1) Failing to be truthful about who had struck JJH in the bathroom at Moe's Restaurant. In her interview on June 2, 2015 Wing said only Danny struck JJH, but subsequent to Wing's polygraph with Carol Miller, Wing affirmed she also struck JJH. CP 163.
- 2) Failing to be truthful about her participation in the conditioning of JJH. During Wing's interview she stated Danny was the one conditioning JJH and omitted her participation. After Wing's polygraph examination with Carol Miller, Wing affirmed she was an active participant, holding down JJH while Danny hit him. Wing would also flick JJH and struck him on his bottom. CP 163.
- 3) Failing to be truthful about abusing JJH while Danny was in jail. Wing stated that no abuse occurred while Danny was in jail. After Wing's polygraph with Carol Miller, Wing admitted hitting JJH for soiling his pants,

flicking him in the mouth, and making JJH do laps and stand in the corner. CP 164.

- 4) Failing to be truthful when she gave her interview on June 2, 2015 by failing to disclose she had lied to Danny when Wing told Danny JJH had put his hand over the baby's nose and mouth. Danny subsequently beat JJH in response to this lie. The State discovered the violation when Wing admitted the lie in a post-polygraph interview on September 25, 2015. Wing also made a phone call from the jail, which was recorded, where she also admitted to lying to Danny about JJH assaulting the baby. When asked why she would do such a thing, Wing responded, "I don't know 'cause I'm a lying piece of shit." CP 32-33.

The trial court found that all of the allegations constituted a breach of the Proffer Agreement. CP 168. The trial court found the breach of allegation one (1) and allegation three (3), by themselves, may not be sufficient to find a material breach, but when combined with the other allegations was sufficient. CP 168. The trial court found the breach of allegation two (2) and allegation (4), individually or when considered with the other allegations, were sufficient to find Wing materially breached the Proffer Agreement. CP 168.

Wing refutes the materiality of the breaches. Wing's argues she admitted her participation in the "conditioning of JJH" and the fact that she remembered further acts later was not a violation of the Proffer Agreement. Brief of Appellant 28-30. Perhaps Wing has a different definition at this time as to what "conditioning" JJH was. The

“conditioning” the State and Wing referred to at the time of the Proffer Agreement and polygraphs was Danny’s (and Wing’s) beating of JJH while asking JJH “who’s hitting you?” CP 74. Then requiring JJH to say, “Mikey and Ben.” *Id.* This interpretation of “conditioning” is supported by Sergeant DeHart’s report, “Information indications WING participated in conditioning of [JJH] by hitting [JJH] and asking him, ‘Who hurt you’ condition him to respond ‘Mikey hurt me.’” CP 222.

Wing in her brief apparently is now including all the abuse that JJH suffered at the hotel in Woodland as “conditioning.” Brief of Appellant 29-30. This is inaccurate. To be in compliance with the agreement Wing had to give complete and truthful information and could not have any “material misstatements or omissions of fact, relating directly or indirectly to **any criminal activity related to the abuse** or death of [JJH].” CP 46. Holding down [JJH] while Danny beat him during the “conditioning” is a failure to give complete information and an omission of fact (it is also a material omission of fact) that related directly to JJH’s abuse. CP 161. This is a material breach of the agreement, proved by the State by irrefutable evidence.

The other stand-alone material breach was Wing's failure to disclose her lie to Danny about JJH abusing the baby by placing his hand over the baby's mouth and nose. CP 168. Wing refutes this is material because Wing truthfully disclosed Danny had hit JJH after she told Danny JJH had abused the baby, and the fact JJH had not actually hurt the baby was immaterial. Brief of Appellant 30-31. Wing's lie to Danny was the impetus for Danny to start viscously abusing JJH. Prior to Wing's lie, JJH had not been viscously beaten, conditioned, and abused on a daily basis. CP 64-80. Wing called Shelly Ward and said, "I told Danny something that [JJH] did that he didn't do and he, [Danny,] beat him for it. He beat the shit out him for it." CP 110. Ms. Ward asked Wing why she would do that, and Wing replied, "I don't know 'cause I'm a lying piece of shit." CP 110-11. Then Wing states,

God knows the only reason why it happened (unintelligible). I didn't expect Danny to fucking do what he did, but that was the start of it. That's what started everything. That's what started all the fucking abuse. It just started everything. I felt the guilty. I (unintelligible) I went in there and I could not put it away.

CP 111. Wing in her own statement to Ms. Ward acknowledges that her lie to Danny related directly to the criminal activity related to the abuse of JJH. See CP 46. It was an omission of facts that were

material. This was a material breach, proved by the State by irrefutable evidence.

Wing argues the finding regarding the abuse in Oregon (at Moe's restaurant) by Wing is not indicative of her being untruthful nor is it material because the State has already learned JJH was spanked in the bathroom of the restaurant and Wing had admitted to spanking JJH herself several other times. Brief of Appellant 31-32. Wing was required in the Proffer Agreement to not only give a truthful statement, but also a complete statement. CP 46. Failing to acknowledge that she also spanked JJH at the restaurant, when the police were called, is an omission of fact, which taken with the other allegations is a material breach. CP 46-47, 66, 161. Claiming Wing "misremembered" is convenient, but does not clear her of her obligation in the agreement. Further, to claim this incident was immaterial simply because JJH was struck so many other times is, frankly, offensive. The State proved, through irrefutable evidence, Wing did not give a complete statement by omitting key facts, which taken with the other allegations was material.

Finally, Wing claims her statement that she did not hit JJH while Danny was in jail, but did not deny disciplining him, therefore, her statement was not untruthful. Brief of Appellant 32-33. In her



interview Wing said, “And um, I take, during the whole time that Danny was in jail, I did not hit JJH, not one time. I didn’t flick him, nothing. CP 86. JJH was on the mending of things.” CP 86. Wing did state she grabbed JJH by the arm once, while Danny was in jail, to lie him down while potty training him. CP 91. Yet, after her polygraph, Wing admitted she spanked JJH for soiling his diaper when Danny was in jail and also flicking JJH in the mouth. CP 166. Wing would also “discipline” JJH by making him do laps and stand in the corner. *Id.* This again is a failure to give a complete and truthful statement. The omission of facts is material when considered with the other allegations because Wing is downplaying her role in the continued abuse of JJH for the period of time while Danny was in jail. This means JJH never had a reprieve from the abuse as Wing claimed in her interview. To claim that spanking a potty training child, who soiled his diaper or pants, is discipline is incomprehensible to the State. The State proved this breach by irrefutable evidence.

The State met its burden to prove Wing materially breached the Proffer Agreement by irrefutable evidence. The trial court’s findings were supported by the evidence presented. This Court should affirm the trial court’s order finding a breach of the Proffer Agreement.

**D. THE TRIAL COURT INQUIRY OF WING'S ABILITY TO PAY  
HER DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS  
WAS SATISFACTORY.**

Wing argues the trial court failed to fully engage in an individualized inquiry regarding Wing's ability to make payments on her legal financial obligations before imposing discretionary costs and fees. Brief of Appellant 34-37. The trial court's consideration was satisfactory given the facts presented and the inquiry of Wing. If this Court finds the trial court erred, the correct remedy is to remand this case back to the trial court for the judge to conduct the required inquiry.

**1. Standard Of Review.**

The determination to impose legal financial obligations by a trial court is reviewed by this Court under an abuse of discretion standard. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (internal citation omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

**2. The Trial Court's Inquiry Was Sufficient For An Individualized Determination That Wing Had The Ability To Pay The Discretionary Legal Financial Obligations.**

Wing was ordered to pay \$500 victim penalty assessment; \$100 domestic violence assessment; \$200 filing fee; \$1000 VUCSA fine; \$100 crime lab fee; \$100 DNA fee; \$1000 jail costs fee. CP 182. The DNA fee, crime victim assessment and filing fee are all mandatory fees. The remaining fees are discretionary.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

*Blazina*, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id.* The trial court must

make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.*

Wing argues the trial court did not engage in the requisite inquiry instead only doing a cursory inquiry as to her ability to pay. Brief of Appellant 36. First, Wing, from her first appearance exercised her right to retain her own counsel, which she did by hiring Mr. Crowley. Supp. CP Prelim App.; Supp. CP NOA. The trial court asked Wing if there was any reason, physically, mentally, emotionally, or financially why she could not pay off the legal financial obligations. 2RP 47. Wing responded, “No, I don’t believe there is.” RP 47. There was no objection to the imposition of the discretionary legal financial obligations. 2RP 58.

The trial court inquiry was sufficient. This Court should affirm the imposition of the discretionary legal financial obligations. If this Court does find the inquiry inadequate, it should remand the case back to the trial court to make the proper inquiry.

**E. WING’S ISSUE REGARDING APPELLATE COSTS IS MOOT WITH THE COURT’S AMENDMENT OF RAP 14.2 .**

Wing argues this Court should not impose appellate costs if the State prevails. This issue has been mooted by the amendment of RAP 14.2, as Wing was found indigent for purposes of this appeal,

and the State has no evidence that her circumstances have changed. See RAP 14.2; CP 232-34. Given that Wing is currently incarcerated in the Department of Corrections the State sees no change likely in her financial status. Nor does the State know how it will ever meet RAP 14.2's burden to show by a "preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2 guarantees there will be no appellate costs imposed upon Wing in this case if the State is the prevailing party.

#### **IV. CONCLUSION**

The trial court conducted an evidentiary hearing prior to finding Wing breached the Proffer Agreement. When the trial court determined there was a breach of the Proffer Agreement it did not incorrectly interpret the Proffer Agreement by misconstruing a section of it. The State met its burden to prove there was a breach of the Proffer Agreement, therefore the trial court correctly found Wing had violated the terms of the agreement by committing a material breach. The trial court conducted an adequate inquiry regarding Wing's ability to pay her discretionary legal financial obligations. Finally, the State will not be able to seek appellate costs due to the amendment of RAP 14.2, as Wing was found indigent for this appeal,

that presumption continues, and the State has no means of disproving her indigency. The State respectfully requests this Court affirm Wing's guilty plea and sentence.

RESPECTFULLY submitted this 20<sup>th</sup> day of January, 2017.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'JLM', written over a horizontal line.

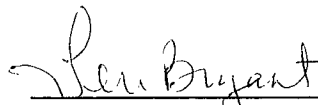
by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  BRENDA ANN WING,  Appellant.	No. 48623-7-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 19, 2017, the appellant was served with a copy of the **Corrected Respondent's Brief** by email via the COA electronic filing portal to Richard W. Lechich, Washington Appellate Project, attorney for appellant, at the following email addresses: [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org) and [richard@washapp.org](mailto:richard@washapp.org).

DATED this 20<sup>th</sup> day of January, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

**January 20, 2017 - 3:19 PM**

## Transmittal Letter

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### Comments:

Corrected Respondent's Brief

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